then bound by law to perform it. There is a very able note to the case of Wennall *vs.* Adney, 3 C. B. 247, explaining this at length. The instances given to illustrate the principle are, among others, the case of a debt barred by certificate [of bankruptcy] and by the Statute of Limitations; and the rule in these instances has been so constantly followed, that there can be no doubt that it is to be considered as the established law." The Court further held that before the usury laws were repealed, the usury would have to be purged from the note, before the new promise would be valid; but after the repeal, that would not be necessary, as no principle of public policy was any longer involved. This case settles two points: one that the note to Wennall *vs.* Adney is established law in England, and the other that a new promise to pay a debt void for usury is within the rule announced in that note.—T. W. D.]

In the Supreme Court of Michigan.

THE MICHIGAN INSURANCE COMPANY OF DETROIT *vs.* HENRY H. BROWN ET AL.[1]

A mortgage to secure all existing debts without naming them, or fixing a limit of liability, is not void for uncertainty, as it affords means of ascertaining, by inquiry, the amount claimed as due at any time.

Equity follows the analogies of the law where an analogous relief is sought upon a similar claim, but where the relief sought is in its nature of equitable, not legal cognisance, equity follows its own rules. Hence, in regard to the foreclosure of a mortgage, which is an ancient equitable remedy, equity, although raising presumptions of payment from lapse of time, has not made them conclusive.

Therefore, on a bill for foreclosure and praying, under the statute of Michigan, a personal decree against the mortgagor for the balance that should be due if the mortgaged premises should prove inadequate, the Court will decree the foreclosure, but the personal decree under the statute being in the nature of a legal remedy, will not be made after such length of time as would have barred an action at law on the bond.

The opinion of the court was delivered by

CAMPBELL, J.—The bill in this cause was filed to foreclose a mortgage made by Henry H. Brown and wife to complainant in November, 1847, conditioned for the payment of "*all sums of*

[1] We are indebted for this case to the courtesy of CAMPBELL, J.

money now due or hereafter to become due." The bill averred a bond of previous date, conditioned for the payment of $11,300, and interest. The bill was filed July 20, 1859. To this bill Brown interposed the statute of limitations as a defence, and Barker averred in his answer that on the 21st day of July, 1859, the day after the bill was filed, he purchased the premises from Brown for a valuable consideration (the amount of which was not set forth), without notice of the mortgage, which was, however, on record. He claimed that the mortgage was invalid because not for a sum certain set forth on its face.

The mortgage and bond set forth in the bill were proved as exhibits before the Commissioner, and are returned as a part of the record. But defendants claim they should be excluded, on the allegation that they were excluded in the court below as not filed in season. Affidavits are filed on both sides.

We have no doubt the proofs are properly in the case. They appear distinctly to have been regularly taken on proper notice, and if they were not filed earlier than is alleged, the court could not on that account regard them as nullities. Had the case presented any grounds for supposing surprise, that would have afforded some reason below for allowing the cause to stand open for further proofs. But the party is bound to know what proof his adversary takes at the time and place appointed, and, if not seeing fit to attend, he may still ascertain it at any time from the Commissioner; and the Court will always be liberal in relieving against accident or surprise. In the case before us there is no reason to believe any surprise possible. The testimony consists entirely of documents set out in the bill *verbatim*, and the proof of their execution. Under rule 56, the mortgage not being denied by the answers, might have been read without being made an exhibit. Although the bond does not prove itself, yet, on being proved, any defence to it must be affirmatively made out. No defence except the statute of limitations is attempted to be made out by proof, and the stipulation extending time covers only the facts attending Barker's purchase. There is no reason, therefore, why this evidence should be disregarded. And, inasmuch as the case has been in this court two years, without any motion to strike it out or have a new tran-

script, we should not be disposed in a more doubtful case to permit such *laches*. But the facts of record show that no injustice can be done by retaining this proof.

It is claimed by defendant, Barker, that this mortgage is invalid for want of certainty in the amount secured. As the complainants do not seek to recover any advances made after Barker's purchase (nor, indeed, any debts accruing after the date of the mortgage), none of the questions in regard to intervening equities arise. The only question presented is whether a mortgage to secure all debts existing is good without specifying them. Upon a review of the cases which were cited on the argument, we are satisfied that there is no legal objection to such a mortgage. It affords a means of ascertaining, by inquiry, the amount claimed to be due at any time. The objection that a limit of liability should appear is more specious than sound. Such a limitation will always be made large enough to cover all contingencies, and leaves it still necessary to make inquiries to learn the real amount secured. And, so far as opportunities for fraud are concerned, such a maximum limit would be quite as convenient a medium of deceit as an open mortgage. As a matter of fact, even where mortgages have been given for specific debts, inquiry is usually necessary to learn the balance unpaid; while mortgages of indemnity introduce not only uncertainty in amount, but contingency of liability. And yet there is no respectable authority which vitiates these. Although upon the question raised in this case, there are some authorities sustaining the defence, the general course of decision is so clearly the other way that we are satisfied the mortgage must be held valid. We are of opinion the law has been settled correctly, and that the supposed evils of permitting such transactions are no greater than those which attend very many other dealings of undoubted legality. We do not, therefore, deem it necessary to inquire into the good faith or valuable consideration of defendant Barker's alleged purchase.

The defendants claim, however, that the mortgage is barred by the statute of limitations. We do not think this ground is tenable. The statute of limitations is confined to actions or suits to enforce payment of the contract as a personal demand. Equity follows the analogies of the law in all cases where an analogous relief is sought

upon a similar claim. But where the relief sought is in its nature one of equitable, and not of legal cognisance, and the remedy is purely of an equitable nature, equity follows its own rules. The foreclosure of mortgages is one of the ancient equitable remedies. Its object is simply to enforce a lien upon lands by making it absolute unless redeemed. If there were any analogy between this and any legal actions, it would apply to real, not personal actions. But, in regard to mortgages, equity, although raising presumptions from the lapse of time, has not made these presumptions conclusive. And, in the present case, the time has not run long enough to raise the presumption of payment, which, in such cases, requires a lapse of twenty years. 1 Story Eq. Juris. § 64*a*, 529; 2 Story Eq. Juris. § 1028*a*, 1028*b*, 1519; 2 Pars. on Cont. 379. The rule fixing such presumptions at twenty years was adopted, undoubtedly, in accordance with the limitation of real actions in the common law courts, but it differs from that in not being an absolute bar to the remedy. We think the complainants are entitled to foreclose their mortgage.

The bill, under the statute, seeks a personal decree against Brown. The power to grant such a decree is not one originally possessed by courts of equity, but is purely statutory, and is given in order to avoid circuity of action by a resort to a suit at law on the debt in addition to a suit in equity to foreclose. It is therefore a mere substitute for a legal action, and must be governed by the rules which would apply at law. The statute allows a personal decree for the balance remaining unsatisfied after sale, "*in the cases in which such balance is recoverable at law.*" If barred at law it is barred in equity.

The bond in the present suit was due more than ten years before suit brought. Although payments are indorsed as made within ten years, the statute expressly denies to such indorsements unexplained any weight as evidence of payment, for the purpose of charging the debtor by treating them as an acknowledgment so as to take the case out of the operation of the law. 2 C. L. § 5377. In the absence of other testimony, therefore, the statutory bar is complete, and no decree can be made against Brown for the balance which may remain unpaid.

The bill, however, should not have been dismissed against him, as he was a necessary party. He was not only mortgagor, but actual owner of the equity of redemption when the bill was filed.

The decree below dismissing the bill must be reversed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

Partnership—Assignment for Benefit of Creditors—Purchase on behalf of Another.—Where the surviving partner of an insolvent firm assigned certain lots of ground belonging to the firm for the benefit of its creditors, the heirs of the deceased partner cannot be made parties to a suit involving the title to the lots, on the ground of any relation of trust or confidence subsisting between them and the assignee: *Rothwell* vs. *Dewees.*

Where a party purchases property under the direction of, or on behalf of another, the purchase must be held to be in trust for the benefit of the principal, on repayment of the money advanced by the agent: *Id.*

Where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to their common benefit upon contribution made to repay the purchase-money: *Id.*

This rule is based upon a community of interest in a common title, creating such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated: *Id.*

The reason of this rule applies as forcibly to the husband of a tenant in common as to one of the immediate co-partners: *Id.*

Devise of Lands—Without Words of Limitation, gives only Estate for Life—Exceptions to this Rule—Ambiguity in a Will.—It is an established rule of the common law, that a devise of lands without words of limitation confers an estate for life only: *King* vs. *Ackerman.*

But because this rule generally defeated the intention of the testator, the Courts have been astute in finding exceptions to it: *Id.*

Where land is devised without legal words of limitation, and a provision is added that the devisee may do therewith as he pleases, a fee is presumed to have been intended: *Id.*

It is also well settled, that where a devisee whose estate is not de-

[1] From Hon. J. S. Black, to appear in Vol. 2 of his Reports.